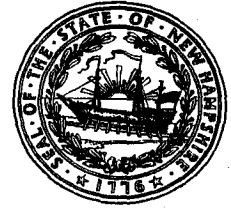




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Gary Bardsley
269 Eastman Hill Road
Sanbornton, NH 03269

Peter + Gary, LLC
6 Checkerberry Lane
Concord, NH 03301

Re: School Street, Loudon Tax Map 38, Lot 8
Wetlands File #2004-2098

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING**

No. AF 05-092

November 7, 2005

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division to Gary Bardsley and Peter + Gary, LLC, pursuant to RSA 482-A and NH Admin. Rule Env-C 601. The Division is proposing that fines totaling \$6,000 be imposed against Gary Bardsley and Peter + Gary, LLC, jointly and severally, for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("the Division"), is an administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Gary Bardsley is an individual with a mailing address of 269 Eastman Hill Road, Sanbornton, NH 03269.
3. Peter + Gary, LLC ("P+G") is a New Hampshire limited liability company with a principal office and mailing address of 6 Checkerberry Lane, Concord, NH 03301.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13 and RSA 482-A:14, III, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the

P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095

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DES Web site: www.des.nh.gov

Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.

3. P+G is the owner of property located on School Street in Loudon, NH, more particularly described as Lot 8 on Loudon Tax Map 38 ("Property"). Peter McGrath is the registered agent and manager of P+G, according to records maintained by the New Hampshire Office of the Secretary of State.

4. On August 3, 2004 P+G filed a *Notice of Intent to Cut Wood or Timber* on the Property with the Town of Loudon. The Notice lists P+G as the Property owner and Gary Bardsley as the logger responsible for logging. Gary Bardsley signed the Notice as the logger for P+G. Peter McGrath signed the Notice as the Property owner and Manager of P+G.

5. On August 30, 2004, the Division received a *Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact* ("Forestry Notification") regarding the Property dated August 26, 2004. The Notification lists P+G as the Property owner and Gary Bardsley as the logger responsible for logging. Peter McGrath signed the Notification as the Property owner and Manager of P+G.

6. As required by the Forestry Notification, a US Geological Survey map and a photocopy of a poled ford was submitted with the location of two wetland crossings to be placed on the Property for the purpose of conducting logging activities.

7. The Forestry Notification states that the Property owner's signature certifies that "... all logging contractors have been directed to conform to the Best Management Practices for *Erosion Control on Timber Harvesting Operations in New Hampshire* ("Forestry BMPs") and have been instructed to install crossings only as indicated on the attached map and sketches."

8. On September 21, 2004, the Division issued a "Complete Forestry Notification" letter to P+G for the Property, acknowledging receipt of the Forestry Notification and stating that the Forestry Notification is sufficient to start work provided that they follow Forestry BMPs and avoid wetland and stream crossings where possible.

9. On May 5, 2005, P+G, through their agent, Gove Environmental Services, Inc., ("Gove") filed a Standard Dredge and Fill Application ("Application") with DES. The Application proposed to fill approximately 3,500 square feet of wetland for the purpose of gaining access to three lots for a proposed five-lot subdivision.

10. Submitted with the Application was a stamped, surveyed plan of the Property entitled "Subdivision Plat of the Land of Peter & Gary LLC" dated January 3, 2005, prepared by Richard D. Bartlett & Associates (the "Plan"). According to the Plan notes, the wetlands on the Property were delineated in February 2004 by Luke Hurley, certified wetland scientist.

11. On May 27, 2005, the Division received a complaint alleging that wetlands and a large vernal pool had been impacted from logging operations performed on the Property.

12. On June 16, 2005, Division personnel conducted a site walk of the Property with a representative from Gove and observed or learned the following:

a. The site had been recently logged. Some exposed soils had been seeded and had recently begun to germinate. According to the representative, Gove had advised Mr. Bardsley to take this action;

b. Pink flagging with numbers were observed in the field. The flags numbered in the field corresponded to the numbered and flagged wetlands shown on the Plan;

c. In the area of wetland flag #61, the area had been rutted. Standing water was observed in the ruts;

d. A vernal pool measuring approximately 30' wide by 150' long was observed. Stumps were observed directly adjacent and within the vernal pool;

e. A poled ford and slash measuring 100' by 12' had been left in a wetland; and

f. At the conclusion of the site visit, the representative from Gove agreed that Gove would prepare a report of wetland impacts from logging activities and restoration plan and forward it to DES.

13. On July 18, 2005, the Division received a summary of wetlands impacts and a restoration plan from Gove. Gove identified 19 areas where wetlands were impacted from logging activities:

a. Fifteen impacts were the result of slash left in the wetland;

b. Two impacts resulted from rutting within the wetland;

c. One impact was the result of unpermitted fill placed in wetland from a skid trail; and

d. One impact resulted from the crossing of a wetland with a log corduroy.

14. On August 24, 2005, the Division issued a Restoration Plan Approval to P+G for the Property.

15. On October 14, 2005, the Division received a Monitoring Report from Gove dated October 12, 2005. The Monitoring Report indicated that twenty-two wetland areas had been seeded and mulched. Slash had been removed from 15 of these 22 areas and 5 of the areas were re-graded to remove ruts caused from logging activities.

16. On October 14, 2005, Division personnel conducted another site walk of the Property and found that the wetland areas observed had been restored consistent with the findings noted in the Gove Monitoring Report.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINE

1. Gary Bardsley and Peter + Gary, LLC have violated NH Admin. Rule Wt 304.05(c) by failing to comply with timber harvesting best management practices, specifically by:

- (a) Failing to remove slash from wetlands and wetland crossings;
- (b) Failing to remove a poled ford after use; and
- (c) Failing to install corduroy, geo-textile, or other suitable crossing device in wetlands, causing excessive rutting in two areas.

2. Env-C 614.06(f) specifies a fine of \$2,000 per violation of Wt 304.05(c), or a fine of \$6,000 for the three violations alleged.

The total fine being sought is \$6,000.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Gary Bardsley and Peter + Gary, LLC have the right to a hearing to contest the Division's allegations before the fine is imposed. A hearing on this matter has been scheduled for **Monday, January 23, 2006 at 1:00 pm** in **Room 110** of the DES offices at **29 Hazen Drive** in Concord, New Hampshire. **Pursuant to Env-C 601.06, you are required to respond to this notice.** Please respond **no later than December 12, 2005**, using the enclosed colored form as follows:

- 1. If you plan to attend the hearing, please sign the appearance section of the colored form (upper portion) and return it to the DES Legal Unit, as noted on the form.
- 2. If you choose to waive the hearing, the hearing will be conducted in your absence in accordance with Env C 204.09.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

If you are unable to attend the hearing as scheduled, you must notify the DES Legal Unit as soon as possible but not later than one week in advance of the hearing and request that the hearing be rescheduled for good cause. If you do not notify the DES Legal Unit in advance and do not attend the hearing, the hearing will be conducted in your absence in accordance with Env C 204.09.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.
3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that Gary Bardsley and Peter + Gary, LLC committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.**

If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If you have any questions about this matter, please contact the DES Legal Unit, at (603) 271-7509.


Harry T. Stewart, Esq. Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

cc: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office
Kerry D. Barnsley, Compliance Attorney, DES Legal Unit
Linda Magoon, DES Wetlands Bureau
cc: Marjorie Swope, NHACC
Town of Loudon Board of Selectmen and Conservation Commission

***** RETURN THIS PAGE ONLY *****

**PETER + GARY, LLC IS REQUIRED BY LAW TO
RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN December 12, 2005

APPEARANCE On behalf of Peter + Gary, LLC:

_____ I will attend the hearing scheduled for **Monday, January 23, 2006 at 1:00 pm.** in Room 110 of the DES offices at 29 Hazen Drive in Concord, New Hampshire.

Signature

Date

Name (please print or type):

Title:

Phone Number:

WAIVER OF HEARING On behalf of Peter + Gary, LLC:

_____ I certify that I understand my right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. I understand that the hearing will be conducted in my absence in accordance with Env-C 204.09.

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type):

Title:

Phone Number:

RETURN THIS PAGE ONLY AND ANY PAYMENT TO:

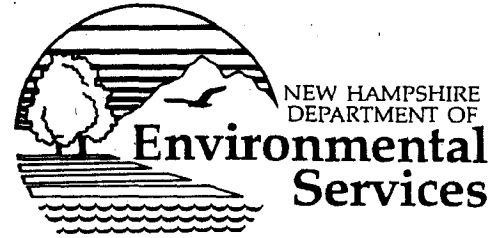
DES Legal Unit

Attn: Michael Sclafani, Legal Assistant

P.O. Box 95

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ENVIRONMENTAL Fact Sheet



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Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.